

ORIGINAL

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10 Attorneys for Plaintiff  
 SIDENSE CORP.

12 UNITED STATES DISTRICT COURT  
 13 FOR THE NORTHERN DISTRICT OF CALIFORNIA

15 SIDENSE CORP., a Canadian Corporation

16 Plaintiff,

17 v.

18 KILOPASS TECHNOLOGY INC., a  
 19 California Corporation, and Charlie Cheng,  
 an individual,

20 Defendants.

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 RICHARD W. WIEKING  
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 NORTHERN DISTRICT OF CALIFORNIA  
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CV11 4112  
 Case No.

COMPLAINT FOR DEFAMATION,  
 UNFAIR COMPETITION UNDER  
 LANHAM ACT § 43(A), INTENTIONAL  
 INTERFERENCE WITH  
 CONTRACTUAL RELATIONS,  
 INTENTIONAL INTERFERENCE WITH  
 PROSPECTIVE ECONOMIC  
 ADVANTAGE, AND UNFAIR  
 COMPETITION UNDER BUS. & PROF.  
 CODE § 17200

JURY TRIAL DEMANDED



1 Plaintiff Sidense Corp. ("SIDENSE") brings this civil action against Kilopass Technology,  
 2 Inc. ("KILOPASS") and Mr. Charlie Cheng ("CHENG"), and for its complaint alleges as follows:  
 3

4 **PARTIES**

5 1. SIDENSE is a Canadian Corporation with its principal place of business at 84  
 6 Hines Road, Suite 260, Ottawa, Ontario, Canada, K2K 3G3.  
 7 2. KILOPASS is a California Corporation with its principal place of business at 3333  
 8 Octavius Drive, Santa Clara, California 95054.  
 9 3. CHENG is the Chief Executive Officer of KILOPASS and, on information and  
 10 belief, is a citizen of the United States residing in the Northern District of California.

11 **JURISDICTION AND VENUE**

12 4. This Complaint involves a citizen of a foreign state and citizens of a State.  
 13 SIDENSE is a Canadian Corporation. KILOPASS is a California corporation. On information and  
 14 belief, CHENG is a citizen and resident of California. The amount in controversy exceeds  
 15 \$75,000. Subject matter jurisdiction is, therefore, proper under 28 U.S.C. § 1332.

16 5. KILOPASS admits that personal jurisdiction and venue are appropriate in this  
 17 district through its Complaint filed in *Kilopass Technology, Inc. v. Sidense Corp.*, Case No. C 10-  
 18 02066 SI. Venue is further appropriate in this district because KILOPASS and CHENG are subject  
 19 to personal jurisdiction here, reside here, and have committed a substantial number of the alleged  
 20 acts described below here.

21 **INTRADISTRICT ASSIGNMENT**

22 6. This action should be assigned to the San Francisco Division because SIDENSE  
 23 and KILOPASS are parties to *Kilopass Technology, Inc. v. Sidense Corp.*, Case No. C 10-02066  
 24 SI currently pending in that Division, and CHENG is CEO of KILOPASS.

25 **GENERAL ALLEGATIONS**

26 7. SIDENSE, founded in 2004, has recently become increasingly recognized as the  
 27 leading innovator in the emerging market for "one transistor" (1T bitcell), one-time programmable  
 28 (OTP) embedded non-volatile memory (eNVM). SIDENSE's 1T-Fuse™ memory products



1 provide the industry's smallest footprints, lowest power, fastest access times, highest densities, and  
2 highest reliability. SIDENSE's customers employ SIDENSE's technology in a variety of integrated  
3 circuits, which are then placed in a consumer electronics product such as a smartphone or set top  
4 box. The United States Patent and Trademark Office ("USPTO") granted SIDENSE United States  
5 Patent No. 7,402,855 (the "'855 patent") for the inventions embodied in the 1T-Fuse™ memory  
6 products.

7       8.       With market demand moving from yesterday's larger and less efficient antifuse  
8 memory to SIDENSE's 1T-Fuse™ memory designs, and becoming increasingly unable to fairly  
9 compete with SIDENSE's technology on the merits, KILOPASS, a SIDENSE competitor, and  
10 CHENG embarked on a plan and scheme to (1) harass SIDENSE, its customers and potential  
11 customers, and (2) try to intimidate and frighten SIDENSE customers and potential customers  
12 away from doing business with SIDENSE.

13       9.       In furtherance of this plan and scheme, in May 2010, KILOPASS filed a baseless  
14 request for inter-partes reexamination with the USPTO seeking to invalidate all claims of  
15 SIDENSE's '855 patent, alleging that these patent claims were unpatentable over KILOPASS' 1T  
16 prior art patents. In January 2011, the USPTO issued an "Action Closing Prosecution" of the '855  
17 patent reexamination, rejecting Kilopass baseless assertions of invalidity, and specifically  
18 confirming the patentability of all original claims over the KILOPASS 1T prior art patents, and  
19 also confirming the patentability of additional new claims that SIDENSE had added during the  
20 inter partes re-examination proceedings over the KILOPASS 1T prior art patents.

21       10.       Also in furtherance of this plan and scheme, KILOPASS filed a baseless lawsuit  
22 against SIDENSE in May 2010, amended in June 2010, to allege *inter alia* that SIDENSE  
23 infringed three KILOPASS patents, United States Patent Nos. 6,940,751; 6,777,757; and  
24 6,856,540. Yet, as SIDENSE explained to KILOPASS roughly five years earlier in 2005, when  
25 KILOPASS first raised these patents with SIDENSE, products embodying SIDENSE's technology  
26 do not infringe because at least three claim elements are not found in SIDENSE's product. On  
27 information and belief, KILOPASS filed this baseless lawsuit to harass SIDENSE and its  
28 customers, to create fear, uncertainty, and doubt concerning SIDENSE and its technology in the

1 marketplace, and to force SIDENSE to divert time, money, and effort to defend against  
2 KILOPASS' spurious allegations.

3       11. Also, in furtherance of this plan and scheme, KILOPASS and CHENG embarked  
4 upon a campaign of publishing false and misleading information in press releases to the general  
5 public including to SIDENSE's customers and potential customers, to the customers and potential  
6 customers of SIDENSE's customers, and to the officers, directors, employees and attorneys of  
7 SIDENSE's customers, potential customers, and of SIDENSE's customers' customers and potential  
8 customers; in mass e-mail mailings to individuals including, on information and belief, the  
9 officers, directors, employees, and attorneys of SIDENSE's customers, potential customers, and of  
10 SIDENSE's customers' customers and potential customers; and in in-person communications to  
11 numerous individuals including, on information and belief, the officers, directors, employees, and  
12 attorneys of SIDENSE's customers, potential customers, and of SIDENSE's customers' customers  
13 and potential customers. On information and belief, KILOPASS and CHENG have embarked  
14 upon this campaign of false and misleading information to harass SIDENSE and its customers, to  
15 create fear, uncertainty, and doubt concerning SIDENSE and its technology in the marketplace,  
16 and to force SIDENSE to divert time, money, and effort to counteract KILOPASS' and CHENG's  
17 misinformation campaign, and to prevent SIDENSE's customers and potential customers from  
18 doing business and/or continuing to do business with SIDENSE.

19       12. Pursuant to this campaign of false and misleading information, despite its failure to  
20 invalidate even a single one of SIDENSE's '855 patent claims, KILOPASS and CHENG issued a  
21 press release in August 2010 falsely proclaiming that the USPTO had invalidated all claims of the  
22 SIDENSE '855 patent: "US Patent and Trademark Office (USPTO) Invalidates All Claims of  
23 SIDENSE's Key Patent ('855)," (emphasis added). This press release implied that SIDENSE had  
24 been unable to persuade the USPTO that SIDENSE's technology was materially different from the  
25 KILOPASS prior art patents upon which KILOPASS' patent infringement is based, and that  
26 SIDENSE did not own intellectual property rights to which it had been selling, and offering to  
27 sell, licenses to SIDENSE's customers and potential customers. In fact, the USPTO has never  
28 invalidated any claims of the SIDENSE '855 patent. Instead, on January 26, 2011, the USPTO



1 issued an "Action Closing Prosecution" of the '855 patent reexamination, specifically confirming  
 2 the patentability of all original claims over the KILOPASS 1T prior art patents, and also  
 3 confirming the patentability of additional new claims that SIDENSE had added during the inter  
 4 partes re-examination proceedings over the KILOPASS 1T prior art patents. KILOPASS and  
 5 CHENG are well aware that this assertion is false since KILOPASS has fully participated in the  
 6 *inter partes* re-examination proceedings.

7       13. Pursuant to this campaign of false and misleading information, as recently as  
 8 August 2011, KILOPASS and CHENG have stated that "SIDENSE continues to offer [its 1T  
 9 intellectual property] for license ... knowing [that a] substantial portion of its ['855] patent claims  
 10 have been rejected." This statement is intended to imply that SIDENSE lacks ownership of the  
 11 intellectual property rights it has been selling and offering to sell to its customers and potential  
 12 customers. In fact, as stated above, in January 2011, the USPTO issued an "Action Closing  
 13 Prosecution" of the '855 patent reexamination, specifically confirming the patentability of all  
 14 original claims over the KILOPASS 1T prior art patents, and also confirming the patentability of  
 15 additional new claims that SIDENSE had added during the inter partes re-examination  
 16 proceedings. KILOPASS and CHENG are well aware that this assertion is false since KILOPASS  
 17 has fully participated in the *inter partes* re-examination proceedings.

18       14. Pursuant to this campaign of false and misleading information, at least as early as  
 19 February 2011, KILOPASS and CHENG began publishing statements indicating that SIDENSE's  
 20 *inter partes* re-examination proceedings in the USPTO regarding KILOPASS United States Patent  
 21 No. 6,940,751 ('751) had been concluded in KILOPASS' favor, thereby foreclosing SIDENSE  
 22 from challenging the validity of that patent in defense of KILOPASS' patent infringement lawsuit,  
 23 including a February 2011 press release which falsely stated that, "with the USPTO's [recent]  
 24 pronouncement on the '751 patent, Sidense can no longer use patent invalidity as a possible  
 25 defense [in the patent infringement litigation]," so that this ruling "Strengthens Kilopass' Patent  
 26 Case; [and] Leaves Sidense Few Options " (emphasis in the original). In fact, the referenced  
 27 USPTO ruling was interlocutory and, therefore, does not foreclose SIDENSE from challenging  
 28 invalidity of the '751 patent in the infringement litigation.



1       15. Pursuant to this campaign of false and misleading information, on information and  
2 belief, in about February 2011, KILOPASS and CHENG offered to pay Clive Maxfield, editor of  
3 the EE Times Programmable Logic Design Line website, to write an article about KILOPASS'  
4 patent infringement lawsuit against SIDENSE entitled "STOP! Are You Gambling on Your  
5 Memory IP?" in order to make it falsely appear that the information and viewpoints appearing in  
6 the article were the independent observations of Mr. Maxfield and the EE Times, including that  
7 utilizing SIDENSE's technology might "violate [Kilopass'] patents... [and] you might find  
8 yourself in court at some stage." This article, which was published in the EE Times on March 3,  
9 2011, included self-serving statements of CHENG, and a section entitled "The Litigation  
10 Landscape" which warned that persons who infringe patents could be sued in the United States  
11 courts, the ITC, and in the courts of Japan and other foreign countries, and which described  
12 litigation in the United States courts and ITC as costing up to \$10 million or more, thereby  
13 implying that Mr. Maxfield and EE Times had independently concluded that companies whose  
14 products embody SIDENSE's technology could be exposed to costly litigation of that sort. On  
15 information and belief, after Mr. Maxfield had written the article, KILOPASS and CHENG  
16 reneged on the agreement to pay Mr. Maxfield for writing the article.

17       16. Pursuant to this campaign of false and misleading information, in about August  
18 2010, KILOPASS and CHENG began contacting SIDENSE customers and potential customers  
19 threatening to sue them imminently as patent infringers in Federal District Court (for damages for  
20 alleged infringement and an injunction against continued alleged infringement) and/or as  
21 respondents in a legal action in the International Trade Commission (to prevent SIDENSE's  
22 customers, and SIDENSE's customers' customers, from shipping their products containing the  
23 allegedly infringing technology into the United States) and/or in Japan (for damages for alleged  
24 patent infringement and injunction against continued alleged infringement), falsely asserting that  
25 its 6,940,751, 6,777,757, and 6,856,540 patents were broad enough to cover SIDENSE's 1T-  
26 Fuse™ memory products. For example, on information and belief, in December 2010,  
27 KILOPASS told a SIDENSE customer that KILOPASS would file an International Trade  
28 Commission action against products embodying SIDENSE technology in February 2011. In fact



1 KILOPASS has never sued any SIDENSE customer or potential customer for infringement based  
 2 upon use or potential use of SIDENSE's 1T-Fuse™ technology in any court, nor has it brought an  
 3 action in the International Trade Commission.

4 17. Pursuant to this campaign of false and misleading information, on information and  
 5 belief, by at least July and August 2011, KILOPASS, often through CHENG, had begun falsely  
 6 telling SIDENSE's customers and potential customers that SIDENSE is not financially stable, that  
 7 SIDENSE is no longer commercially viable, that SIDENSE will soon be bankrupt, and/or that  
 8 SIDENSE is going out of business. In fact, SIDENSE is financially stable, commercially viable,  
 9 is not going bankrupt, and is not going out of business.

10 18. Pursuant to this campaign of false and misleading information, in June 2011,  
 11 KILOPASS and CHENG began telling SIDENSE's customers and potential customers that  
 12 SIDENSE was refusing to take responsibility for its customers allegedly infringing chips and that  
 13 SIDENSE was telling the Court that its customers, rather than SIDENSE, should be sued for  
 14 patent infringement. For example, in a mass e-mailing dated June 28, 2011, sent to officers,  
 15 directors, employees, and attorneys of SIDENSE's customers and potential customers, KILOPASS  
 16 and CHENG said "Sidense has refused to take responsibility for its customers' chips that contain  
 17 the embedded Sidense OTP, which stands accused of patent infringement," and that "Sidense  
 18 indicat[ed] to the court that it is its licensees who should be charged as direct infringers." In fact,  
 19 SIDENSE has never refused to take responsibility for its customers' allegedly infringing chips, and  
 20 never said that its customers should be sued for patent infringement or charged as infringers. To  
 21 the contrary, SIDENSE is vigorously defending KILOPASS' accusations of patent infringement,  
 22 including KILOPASS' accusations in the District Court patent litigation that SIDENSE's  
 23 customers' products which embody SIDENSE technology infringe the KILOPASS patents.

24 **FIRST CAUSE OF ACTION**

25 (Defamation)

26 19. SIDENSE realleges and incorporates by reference paragraphs 1 through 18 above  
 27 as though fully set forth herein.

20. At all relevant times alleged here, all KIOPASS employees were acting in their official capacity as KIOPASS employees and, therefore, their actions are attributable to KIOPASS.

21. KILOPASS' and CHENG's false and misleading representations to SIDENSE customers identified herein, which are per se defamatory, have adversely affected SIDENSE's business and reputation.

22. KILOPASS' and CHENG's statements establish a *prima facie* case of actionable defamation because they involve SIDENSE's business, were published, were and are false, and were made with the knowledge that they were false, and with spite, hatred, and ill will toward SIDENSE. KILOPASS and CHENG had no reasonable grounds to believe the statements were true, and KILOPASS and CHENG acted with reckless disregard for ascertaining the truth. Thus, KILOPASS' and CHENG's statements are actionable *per se* and SIDENSE is entitled to damages in an amount to be proven at trial.

23. As a proximate result of KILOPASS' and CHENG's defamatory statements, SIDENSE has suffered loss of customers, harm to its reputation, and was exposed to contempt. SIDENSE therefore suffered specific and general damages, including punitive damages, in an amount to be proven at trial.

24. As a proximate result of KILOPASS' and CHENG's defamatory statements, SIDENSE has suffered and will continue to suffer irreparable harm unless KILOPASS and CHENG cease making the statements alleged herein. SIDENSE has no adequate remedy at law and is entitled to preliminary and permanent injunctive relief.

## **SECOND CAUSE OF ACTION**

### (Federal Unfair Competition)

(Lanham Act § 43(a); 15 U.S.C. § 1125(a))

25. SIDENSE realleges and incorporates by reference paragraphs 1 through 24 above as though fully set forth herein.

26. At all relevant times alleged here, all KIOPASS employees were acting in their official capacity as KIOPASS employees and, therefore, their actions are attributable to KIOPASS.

27. KILOPASS and CHENG have used and continue to use false or misleading representations of facts in interstate commerce in promotion of its products that falsely portray SIDENSE's products with the intent to materially affect the buying decisions of prospective customers.

28. KILOPASS' and CHENG's statements to SIDENSE customers and potential customers that SIDENSE's 1T-Fuse<sup>TM</sup> memory products infringes the '757, '540, and '751 patents are false, objectively baseless, and, on information and belief, KILOPASS and CHENG made the allegations in bad faith.

29. KILOPASS' and CHENG's conduct complained of herein has caused SIDENSE injury, is malicious, fraudulent, knowing, willful, and deliberate entitling SIDENSE to an accounting of KILOPASS' and CHENG's profits, increased damages, and attorneys' fees and costs incurred in prosecuting this action under 15 U.S.C. § 1117.

30. As a proximate result of KIOPASS' and CHENG's defamatory statements, SIDENSE has suffered and will continue to suffer irreparable harm unless KIOPASS and CHENG cease making the statements alleged herein. SIDENSE has no adequate remedy at law and is entitled to preliminary and permanent injunctive relief.

### **THIRD CAUSE OF ACTION**

## (Intentional Interference With Contractual Relations)

31. SIDENSE realleges and incorporates by reference paragraphs 1 through 30 above as though fully set forth herein.

32. At all relevant times alleged here, all KIOPASS employees were acting in their official capacity as KIOPASS employees and, therefore, their actions are attributable to KIOPASS.

33. SIDENSE and its customers are parties to End User License Agreements. At all times alleged herein, KILOPASS and CHENG were aware of the End User License Agreements

1 between SIDENSE and its customers and intended by its acts to interfere with these contractual  
2 relationships or make performance under the contracts more difficult.

3 34. On information and belief, as a proximate result of the acts of KIOPASS and  
4 CHENG and their agents as alleged herein, performance of these End User License Agreements  
5 by SIDENSE's customers has become more difficult and, in certain instances, has ceased  
6 completely.

7 35. As a proximate result of KIOPASS' and CHENG's defamatory statements,  
8 SIDENSE has suffered and will continue to suffer irreparable harm unless KIOPASS ceases  
9 making the statements alleged herein. SIDENSE has no adequate remedy at law and is entitled to  
10 preliminary and permanent injunctive relief.

11 **FOURTH CAUSE OF ACTION**

12 (Intentional Interference With Prospective Economic Advantage)

13 36. SIDENSE realleges and incorporates by reference paragraphs 1 through 35 above  
14 as though fully set forth herein.

15 37. At all relevant times alleged here, all KIOPASS employees were acting in their  
16 official capacity as KIOPASS employees and, therefore, their actions are attributable to  
17 KIOPASS.

18 38. KIOPASS and CHENG deliberately interfered with SIDENSE's prospective  
19 economic advantage. SIDENSE has enjoyed prospective economic relationships with customers  
20 and prospective customers that were of substantial economic benefit to SIDENSE. With  
21 knowledge of these valuable relationships, KIOPASS and CHENG have made false and  
22 misleading statements designed to interfere with and disrupt SIDENSE's relationships with  
23 existing and prospective customers. KIOPASS' and CHENG's actions were independently  
24 wrongful as they violated both Federal and California law as alleged herein.

25 39. KIOPASS and CHENG acted both oppressively and maliciously with intent to  
26 cause injury to SIDENSE and with conscious disregard of the rights of others. As such SIDENSE  
27 is entitled to exemplary damages, in addition to compensatory damages, as permitted by law.

40. As a proximate result of KIOPASS' and CHENG's defamatory statements, SIDENSE has suffered and will continue to suffer irreparable harm unless KIOPASS and CHENG cease making the statements alleged herein. SIDENSE has no adequate remedy at law and is entitled to preliminary and permanent injunctive relief.

## **FIFTH CAUSE OF ACTION**

(Unfair Competition Under California Business and Professions Code § 17200)

41. SIDENSE realleges and incorporates by reference paragraphs 1 through 40 above as though fully set forth herein.

42. KILOPASS' and CHENG's conduct as alleged herein constitutes "unlawful, unfair, or fraudulent business act[s] or practice[s]" within the meaning of California Business and Professions Code § 17200 *et. seq.*

43. As a direct and proximate cause of KILOPASS' and CHENG's wrongful conduct, SIDENSE has been and will continue to be harmed and KILOPASS and CHENG have been and will continue to be unjustly enriched.

44. As a direct and proximate result of KIOPASS' and CHENG's conduct, SIDENSE is entitled to injunctive relief, restitution, and an order of disgorgement of all of KIOPASS' and CHENG ill-gotten gains from its unlawful, unfair, or fraudulent business acts or practices.

## PRAYER FOR RELIEF

SIDENSE prays for judgment as follows:

1. For judgment that the statements alleged herein are defamatory per se;
2. For judgment that KILOPASS and CHENG have engaged in federal and California state unfair competition, including false advertising and disparagement, and intentional interference in contractual relations and prospective economic advantage;

3. For judgment that KILOPASS and CHENG are jointly and severally liable for the aforesaid wrongful and unfair acts;

4. For preliminary and permanent injunctive relief enjoining the aforesaid wrongful and unfair acts by KIOPASS and CHENG, and those persons acting in concert with KIOPASS

and CHENG, including related individuals, entities, customers, agents, or representatives pursuant to 15 U.S.C. § 1116 and California Business and Professions Code § 17203;

5. For SIDENSE's actual damages sustained as a result of the acts alleged herein, together with prejudgment interest, according to proof;

6. For an accounting of the profits of KIOPASS and CHENG resulting from its wrongful and unfair acts alleged herein;

7. For restitution of any profits acquired by means of KILOPASS' and CHENG's unfair competition;

8. For enhanced damages pursuant to 15 U.S.C. § 1117;

9. For punitive damages;

10. For an award of attorneys' fees pursuant to 15 U.S.C. § 1117 or as otherwise permitted by law:

11. For SIDENSE's costs of suit, including reasonable litigation expenses, pursuant to  
15 U.S.C. § 1117 or as otherwise permitted by law; and

12. For any additional relief the Court deems just and proper.

KILPATRICK TOWNSEND & STOCKTON LLP

By: RCook  
ROGER L. COOK

Attorneys for Plaintiff  
SIDENSE CORP.

**DEMAND FOR JURY TRIAL**

Plaintiff SIDENSE hereby demands a trial by jury of all issues triable by jury pursuant to Federal Rule of Civil Procedure 38(b) and Civil Local Rule 3-6(a).

DATED: August 19, 2011

Respectfully submitted,

# KILPATRICK TOWNSEND & STOCKTON LLP

By: R. Cook  
ROGER L. COOK

Attorneys for Plaintiff  
SIDENSE CORP.

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